No. [redacted] 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 7

FLOYD LINN RATHBUN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Floyd Linn Rathbun, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on the 23rd day of August, A.D. 1956.

I. OPINION BELOW

The judgment of the District Court of the United States and the opinion of the Court of Appeals for the Tenth Circuit are printed in Appendix C, *infra*, p....

JURISDICTION

The judgment sought to be reviewed was entered by the United States District Court for the District of Colorado on October 21, 1955, affirmed by the United States Court of Appeals for the Tenth Circuit on August 23, 1956. A Petition for rehearing was denied by the Court of Appeals on October 1, 1956. A stay of mandate was entered by the Court of Appeals on October 1, 1956. Jurisdiction of this Court is invoked under Art. III, Sec. 2, Constitution of the United States.

QUESTIONS PRESENTED

This case involves the interpretation and application of a statute of the United States, to-wit: Sec. 605, Title 47, U.S.C.A., commonly referred to as the Communications Act; and also involves the right of an accused person to offer rebuttal at the time of trial.

The questions presented are:

(1) Is the listening in of third parties on an extension telephone in an adjoining room, without consent of the sender, an interception of a telephone message, and the divulgence of the contents of such conversation prohibited by statute, to-wit Sec. 605, Title 47, U.S.C.A.

(2) Does a person accused of crime have a right of rebuttal, when such right is requested.

STATUTES INVOLVED

Title 47, Sec. 605, U.S.C.A. provides that no person not being authorized by the sender shall intercept any communication and divulge or publish the contents of such communication.

The full text of this statute is quoted in Appendix A, *infra*, p. 9.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, by Article V of Amendments provides that no person shall be deprived of life, liberty or property, without due process of law.

The full text of this Article is quoted in Appendix B, *infra*, p. 9.

STATEMENT OF THE CASE

Summary

Rathbun, the petitioner, and Everett H. Sparks had engaged in numerous business transactions together. Rathbun caused to be issued in the name of Sparks a certificate for 120,000 shares of Western Oil Fields stock, which certificate was used as collateral for a $50,000.00 loan ob-

tained at a Denver Bank, the proceeds of the loan being delivered to Rathbun. The stock admittedly did not belong to Sparks, but was Rathbun's stock.

Rathbun went to New York to endeavor to obtain further finance and several conversations were had by long distance telephone between him and Sparks, and relating to the release of the certificate held as security. The last conversation between them was not a friendly one. Sparks, without Rathbun's knowledge, had two police officers of the Pueblo police force listening in on an extension telephone in another room of his dwelling to this conversation. These two officers were permitted to testify as to this conversation, the District Court holding that the same was not an interception and divulgence in violation of Sec. 605, Title 47, U.S.C.A.

At the trial of this matter, the prosecution offered certain witnesses in rebuttal. At the conclusion of the prosecution's rebuttal, request was made for permission to put on rebuttal evidence on behalf of the defendant, Rathbun, which request was refused by the District Court. We submit that this ruling constitutes a violation of the due process clause of the United States Constitution.

DETAILED STATEMENT

The essential facts above summarized may be spelled out in detail as follows:

Rathbun, petitioner, and Everett H. Sparks, had been well acquainted over a period of years and had done business together on a number of occasions, each had loaned the other money, and through various business transactions Rathbun became indebted to Sparks. Rathbun needing an additional $50,000.00 but was unable to obtain it from the bank on his own signature and the bank advised that it would loan the money upon the signature of Sparks. In order to secure Sparks in the matter, a certificate of Western Oil Fields, Inc. for 120,000 shares was issued in the name of Sparks and deposited with the loaning bank as security for the loan, at which time Western Oil Fields stock was selling for between $6.00 and $7.00 per share. The loan was made to Sparks in the amount of $50,000 and he in turn

delivered the money to Rathbun. There is no dispute in the testimony that the stock certificate did not belong to Sparks but was only issued in his name to be used as collateral.

Differences arose between the two men and Rathbun went to New York City to endeavor to obtain sufficient finance to pay off the loan to Sparks and obtain the release of the Western Oil Fields stock certificate, an arrangement to which Sparks had agreed prior to Rathbun's making the trip to New York.

On March 16, 1955, and extending into the early morning of March 17, 1955, several telephone conversations were had between Rathbun in New York and Sparks in Pueblo. In the last telephone call, which was made in the early morning hours of March 17, 1955, the conversation between Sparks and Rathbun was not a friendly one. The call was placed by Rathbun in New York to Sparks in Pueblo, and prior to accepting this call, Sparks called the police department in Pueblo, and two officers of the Pueblo Police Department, Sergeant Huskins and Captain Maybers, came to the Sparks home. Sparks requested these two officers to listen in on an extension line in another room to the conversation between him and Rathbun. One of the officers, Sergeant Huskins, testified that Rathbun stated to Sparks in that conversation, that he (Rathbun) was going to return to Denver and Kill Sparks. Maybers testified only that Rathbun said he was going to return and finish the matter for good. Objections were made to the testimony of these officers as being inadmissible under the provision of Sec. 605, Title 47, U.S.C.A. The objection was overruled by the District Court and the testimony admitted.

Rathbun admits that the telephone calls were made, but denied that he at any time threatened to kill Sparks.

Sparks had testified relative to a conversation between him and Rathbun which had occurred in November of 1954, and transaction between them, out of which the indictments arose. Mrs. Madelyn Rathbun, wife of Floyd Linn Rathbun, testified that during the meeting between the two men she was present and, no harsh words were uttered by either

Sparks or Rathbun, and no threat made by Rathbun to do injury to Sparks.

In rebuttal both Sparks himself and Bruce Johnson, a former employee of Sparks, took the stand to deny what transpired at that November 1954 Meeting; Johnson testifying that he had been present at the time of the meeting and that Rathbun had threatened to kill Sparks.

At the close of plaintiff's rebuttal, defendant Rathbun sought to put on rebuttal testimony for the purpose of impeaching the rebuttal testimony of the witness Johnson. The District Court refused to permit defendant to offer any rebuttal testimony.

By reason of such ruling the defendant was denied a right guaranteed to him by the Constitution of the United States, the right of due process.

The Court of Appeals upheld these rulings of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in effect a revocation of Section 605, Title 47, U.S.C.A.

The decision of the Circuit Court of Appeals, Tenth Circuit, with reference to the above cited federal statute is in conflict with the decisions of other Circuit Court of Appeals.

Goldman v. United States, 316 U.S. 129
United States v. Bookie, 229 F. 2nd, 130
Flanders v. United States, 222 F. 2d, 163
United States v. Polakoff, 112 F. 2d 888
Reitmeister v. Reitmeister, 162 F. 2d 691

There is involved here an important question of a federal statute, the construction and application of which has varied by the decision of each circuit court.

The effect of the ruling of the District Court and the decision of the Court of Appeals of the Tenth Circuit is to wholly nullify and abrogate Sec. 605, Title 47, U.S.C.A. It has placed upon the statute as written a limitation—a limitation not placed therein by the Legislature. The statute is broad, and provides that "****no person*, not being authorized

by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person**." The Court of Appeals has by judicial decision inserted other words into that statute; it has by this decision said that the statute means "no person shall intercept by means of wire tapping, any communication." Had Congress intended to so limit the manner and mode of interception, it would have so defined and limited interception. This it did not do. Nor would an interpretation of Section 605 commend itself to reason whereby a communication intercepted by one method could be received in evidence, while a communication intercepted by another method would not be admissible. The broad and inclusive language of the section does not limit the interception to one means only, but a message is intercepted if the speaker thinks he is talking to one person, whereas in fact a third person is listening.

U. S. v. Gruber, 123 Fed. (2d) 307; *Billeci v. U. S.*, 184 F. (2d) 394.

The Constitution of the United States delegates to the Congress the power to make the laws of the land; The Court of Appeals by its decision in this case has abrogated and nullified the statute passed by the Congress. It has gone far afield. It has stepped from the judicial branch of the government into the legislative branch. This it cannot do.

The decision of the Court of Appeals brings forth a factual requirement which becomes so fine that it cannot be measured by any instrument known to man. Judicial notice will be taken of the fact that sound travels at approximately 1,100 feet per second. The decision holds that it becomes necessary to establish factually which ear heard the sound first, whether the receiver or the intercepter, and that is the same as saying if the lead from the point of interception was one inch longer than the lead to the receiver, there would be no interception. In other words, an Act of Congress by this decision is defeated and thwarted by an extra inch, or an extra foot, or an extra fraction of an inch of wire.

In order to completely implement this decision, it would be necessary to bring in chemical analysis of the wire

between the point of interception and the ear of the intercepter and the ear of the receiver. Unless the conductivity of the wire used in the two instances was exactly alike, one wire would conduct the sound faster than the other.

2. Does a person accused of crime have a right of rebuttal, when such right is requested.

The prosecution offered evidence on rebuttal of a transaction between Rathbun and Sparks, out of which the criminal indictment arose. Rathbun sought permission of the trial court to offer rebuttal, or surrebuttal as it is sometimes called, and the trial court denied that request. He was prevented from offering further evidence of that transaction, and he was prevented from impeaching the witnesses of the prosecution who testified on rebuttal. In a criminal case one of the elements of due process of law is an impartial trial, and an impartial trial was denied Rathbun. The scope of the Fifth Amendment is not confined by the notion of a trial court that a trial is consuming too much time, and therefore defendant is entitled to offer no rebuttal. The right created by the Constitution of the United States, the right guaranteeing that no person shall be deprived of liberty without due process of law should not be mutilated by the adoption of rules of procedure denying the accused an opportunity to offer rebuttal. The evil of such procedure can readily be seen. The prosecution may in rebuttal bring forth witnesses who deliberately falsify, witnesses who the defendant can prove are testifying falsely against him, yet he is denied the right and opportunity of impeachment by way of rebuttal. Such procedure is hardly calculated to insure a fair and impartial trial.

Wigmore on Evidence, Vol. VI, Third Edition, Sec. 1873-74

Humes v. U. S., 186 F. (2d) 875

CONCLUSION

The principles involved in this case are of broad application and interest. At issue here is nothing less than whether the laws enacted by Congress can be limited or abrogated by judicial decision, and whether the Constitution of the United States and the rights of every person there-

under are to be cast aside in favor of a procedural rule adopted by the Court, a procedural rule which defeats a substantive right.

We respectfully submit that certiorari should be granted and that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated October 12, 1956.

INDEX TO APPENDICES

APPENDIX A

Statute Involved

U. S. C. A., Title 47, Sec. 605, provides:

"**and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

APPENDIX B

United States Constitution, Amendments, Article V, provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself; *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation."

APPENDIX C

Judgment of District Court:

"On this 21st day of October, 1955 came the attorney for the government and the defendant appeared in person and by Thomas K. Hudson, his counsel,

It is Adjudged that the defendant has been convicted upon his plea of not guilty as to Counts No. 1 and No. 2, and a verdict of guilty as to Counts No. 1 and No. 2 of the offense of knowingly transmitting in interstate commerce a communication containing a threat to injure, in violation of Title 18 U.S.C. Section 875 (b) (c) as charged in the Indictment herein and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day upon each of Counts One and Two of the Indictment herein, from and after this 21st day of October, A.D. 1955.

It is further Adjudged by the Court that the terms of imprisonment imposed in each of Counts One and Two of the Indictment herein shall run concurrently.

It is further Adjudged by the Court that the defendant shall pay to the United States of America a fine of One

to kill the said Sparks, in violation of 18 U.S.C. 875 (c) (page 2).

A plea of not guilty was entered by the defendant, (page 3) a trial to jury was had and a verdict finding Rathbun guilty on both Counts One and Two of the indictment was returned by the jury (page 3).

On October 21, 1955, Rathbun received a sentence of one year and one day in prison upon each of the counts, such terms to run concurrently, and to pay a fine of $1,000.00 upon Count One of the indictment (page 4).

Motion for New Trial was denied (page 5) and an approved appearance bond was filed on October 21, 1955.

An appeal was taken to the Court of Appeals for the Tenth Circuit and on August 23, 1956, that Court affirmed the judgment of the District Court (page 15). The decision of the Court of Appeals is published in the Official Reporter System, 236 Fed. (2d) 514.

Petition for Rehearing was filed (page 20) and denied (page 21) on October 1, 1956.

A Stay of Mandate was also ordered on said date (page 21).

Petition for Writ of Certiorari was filed on October 31, 1956.

On January 14, 1957, certiorari was granted limited (page 21) to one question, to-wit:

> Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title 47, U.S.C.A. and the admission into evidence of testimony of said third person relating to the contents of the conversation a divulgence of such intercepted communication and thus prohibited by the aforesaid statute?

The facts as revealed by the evidence and insofar as they are material to the question here presented are briefly as follows:

The complaining witness, Everett Henry Sparks, and the defendant, Floyd Linn Rathbun had been well acquainted with each other and closely associated with each other over a period of fifteen years (page 17) and their acquaintanceship and association had been both social and business. They had done considerable business together, had loaned each other substantial sums of money, had hunted and fished together. Certain stock of Western Oil Fields, Inc., was placed in the name of Sparks (page 17) but was not his stock and was used by him as collateral for a loan at the bank for the benefit of Rathbun. The proceeds of the loan in the amount of $50,000.00 were in turn delivered by Sparks to Rathbun, the stock being held as security (page 17).

On March 16, 1955, and extending into the early morning of March 17, 1955, several telephone conversations were had between Rathbun in New York and Sparks in Pueblo (page 8), in each of which Rathbun was importuning Sparks to release the stock held as collateral upon the payment of the loan (page 17).

At the request of Sparks, two officers of the Pueblo Police Department went to the Sparks' home (page 8-12) and at the request of Sparks, these two officers, Captain Maybers and Sergeant Huskins, listened in on an extension telephone in another room of the Sparks' home to the last conversation between Sparks and Rathbun. These two officers were called as witnesses by the prosecution to testify to the contents of said telephone conversation (pages 9-14).

Objection was made by counsel for the defendant Rathbun to the admission of such testimony upon the grounds that to permit them to testify to what they had heard by listening in on an extension phone without the

consent of Rathbun was a violation of Sec. 605, Title 47, U.S.C.A. (pages 9-10).

The objection was overruled and the officers permitted to testify as to the contents of that conversation as overheard by them (page 11).

Briefly, the substance of the testimony of the complaining witness, Sparks, was to the effect that commencing in the evening of March 16, 1955 and extending into the early morning hours of March 17, 1955, several conversations via long distance telephone were had between him and the defendant, Floyd Rathbun, Rathbun being in New York City and Sparks at his home in Pueblo, Colorado.

The last conversation between them took place at about 1:10 a. m. on March 17, 1955 when Rathbun called Sparks. Sparks, prior to accepting this call, called the Police Department of Pueblo and in response to that call two officers of the Pueblo Police Force, a Captain Robert S. Maybers and Sergeant Herman R. Huskins, had gone to the Sparks' home and were present when the last telephone call from Rathbun came through to Sparks in Pueblo. Sparks requested the officers to listen in on an extension telephone located in the dining room of the Sparks residence which room adjoined the living room where Sparks was receiving the conversation (pages 8-9). Rathbun was not told that the officers were listening in.

The testimony of both Captain Maybers and Sergeant Huskins was to the effect that they responded to the call to the police department made by Sparks and went to the Sparks home in Pueblo, that a telephone call was received by Sparks from Rathbun in New York at about 1:00 a. m. on March 17, 1955, and that Sparks requested the officers to listen in on the conversation, directing them to an extension telephone located in the dining room which adjoined the living room in the Sparks home.

The officers further testified that in this long distance telephone conversation Rathbun threatened the life of Sparks.

It is the admission of the testimony of these officers which defendant contends is in violation of Title 47, Sec. 605; that such listening in on an extension telephone constitutes an interception of the message and the divulgence of the contents of such conversation is prohibited by that statute.

There would seem to be no question but that the defendant, Rathbun, was the sender and that he gave no consent to the listening in by the officers.

Timely objection was made to the admission of their testimony.

V. ARGUMENT

The District Court held that such listening in on an extension telephone was not an interception within the meaning of the statute and permitted the officers to testify and to divulge the contents of the conversation which they overheard.

The Circuit Court of Appeals for the Tenth Circuit with reference to this particular point said: (page 19)

> "We agree with Judge Hand that both parties to a phone conversation are alternately senders and receivers. That question, however, is not material here because the conversation in question was initiated by Rathbun and it must be held that he was the sender and that what he said could not be intercepted in transit and thereafter testified to by the one intercepting it without his consent. We do not mean to say that violation of the "Wire Tapping Act" may not result from listening in on extension telephones. Whether such listening in constitutes a violation of the Act would depend on where the extension phone was attached. In the Reitmeister case, *supra,* the majority said: ". . . we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire made *ad hoc.*" It may be possible as far as we know to attach an extension

(fol. 122) phone so that the message passing over it reaches the ear of the listener before it reaches the ear of the one carrying on the conversation and for whom it is intended."

The Circuit Court has founded upon an erroneous premise its finding and decision that the listening in on an extension telephone was not interception. It said: (page 19)

> "Whether such listening in constitutes a violation of the act would depend on where the extension phone was attached * * *"
>
> "The mechanics of attaching extension phones and the manner in which the extension phone in question was attached are not established by the record."

Where the extension telephone was attached and the method or manner of attaching extension telephones are immaterial. It can make no difference as to the time when a message being transmitted by telephone would be heard by the listener. Such hearing is a simultaneous hearing by all persons on the line. The words spoken are heard by the receiver and by any person listening in regardless of the position of the extension phone or the mechanical device used, and even by the sender, himself, simultaneously.

A brief explanation in non-technical language of the transmission of telephone conversations may be helpful here.

Most types of wave motion can be classified as either longitudinal waves or transverse waves.

A longitudinal wave is one in which small particles of the medium through which the wave travels vibrate in a direction parallel to the wave motion. This causes condensations and rarefactions of the medium. An example of a longitudinal wave is a sound wave traveling in air. The air particles in the wave path will be alternately condensed and rarefied, and any one particular section of the wave will move forward at approximately 1100 feet per second. The speed of sound depends partly on the air

temperature and pressure, 1100 feet per second being accepted as the value at sea level.

A transverse wave is one in which individual particles vibrate at right angles to the direction of the wave. This type of wave does not require a material medium in which to travel, for example, radio waves are transverse waves which can travel through free space, (or through a vacuum).

In a telephone conversation speech is transmitted by sound waves (longitudinal waves) from the speaker to the telephone transmitter, and from the telephone receiver to the listener's ear. However, from the transmitter at one end of the line to the receiver at the other, the speech is carried by electromagnetic waves. These are transverse waves, and in free space travel at the speed of light, approximately 186,000 miles per second.

A telephone call from New York City to Pueblo, Colorado, would travel by micro-wave radio to Denver and then by cable to Pueblo. The micro-wave transmission is at light speed or approximately 186,000 miles per second; the cable transmission is somewhat slower, (50,000 to 100,00 miles per second). Therefore, the total elapsed time for a sound to travel from New York to Pueblo (using the slower cable speed) would be 0.0128 seconds, or just slightly more than 1/100 of a second, or using the micro-wave transmission medium, which is at the speed of light, the transmission would be roughly 3 3/4 times faster, which would make the transmission approximately in 1/375th of a second, and such a space of time is impossible to measure.

Telephones connected 100 feet apart on a line would have a difference of only 0.0000003 second in the time of reception of a message. This is essentially a simultaneous reception and would be an interception of the message regardless of where the extension phone was connected.

Scott J. Marshall
Professor of Electrical Engineering and Electronics
Colorado School of Mines

New Elementary Physics by,
Robert Andrews Millikan and
Henry Gordon Gale

Telephone Theory and Practice
by Kempster B. Miller

The testimony in this case is that the one telephone was in the living room and the other telephone in the dining room which adjoined in a home located in Pueblo, Colorado. Telephone Companies are prone to get telephones as close together as possible and use the least amount of wiring. It is reasonable to assume that a normal size home of this case, the two phones would actually not be over 20 feet apart. If we may assume normal distances in the normal home, we would have to reduce the time element of .0000003 of a second by about eighty per cent. In other words, we are discussing time elements which are impossible of measurement and for all practical purposes are non-existent.

It is the province of the Congress of the United States to make our laws and it is the province of the Courts of the United States to interpret the laws with the final authority for such interpretation resting in the United States Supreme Court.

The word "intercept" as used in the statute is probably unfortunate, as the definition of the word "intercept" according to Webster's Dictionary is "to stop and seize in the way;" so that an item or article will never reach its intended destination. As an example, to intercept a forward pass in football, and the myriad other applications.

It is the duty of the Courts to make an application of the laws passed by Congress which is a reasonable application and which fairly portrays the intent of the Congress. It was not an item of physical interception which Congress

was attempting to prevent, but rather it was the invasion of the privacy of communication. What Congress was attempting to do was to prohibit the "listening in" or "eavesdropping" on private conversation and the statute was not intended to be controlled in its application by the measurement of a few feet of wire and an infinitesimal fraction of a second of time, and it would be totally unrealistic to so hold.

The thing which the decisions are attempting to establish is that private communication cannot be interfered with in any manner and that information obtained through any unauthorized interference in telephonic communication cannot be used for any purpose. The decisions are not uniform in how such interference occurs. Laws should be interpreted in the ordinary intent and purpose as expressed in their verbiage and an obtuse or impossible interpretation by the judiciary should not be read into an obvious statute.

The time element as shown herein is so negligible that it becomes simultaneous and every person connected in a telephone conversation hears the same words at the same time. For the courts to hold differently would be tantamount to repeal of the statute, — a right specifically granted to the Congress.

If the Court holds and finds other than as requested by the defendant in this case, it will be the same as giving to the unscrupulous a blue print as to the proper method of circumventing the intent of the statute. To allow the overheard conversation by the two police officers to be admitted as evidence in this case is the total destruction of the right of privacy of our telephone conversations. Such a decision would bring chaos into the business world as the imagination can conceive of innumerable situations where interception and over-hearing of our telephone conversations would be ruinous. It would lend itself to blackmail and even to a complete business stoppage. The conversations by telephone of the very members of this Honorable Court, the members of the Intelligence Department of our Govern-

ment, the Chiefs of our Army, our Navy and our Air Force, may be listened in to by an extension telephone and the content of those conversations revealed and divulged with immunity.

A decent respect for the policy of Congress must save us from imputing to the statute a self-defeating, if not disingenuous purpose. *Nardone v. United States*, 308 U. S. 338, 341; 60 S. Ct. 266, 268, 84 L.ed 307.

There is an old saying long used by the legal profession that "harsh cases make bad law." Some courts have held in cases cited herein that information obtained by an unauthorized interception either by a listening in by the human ear or by a mechanical device makes the information so obtained illegal to be used either as evidence or as the means to discover evidence. *United States vs Coplon*, 88 Fed. Supp. 921.

We earnestly urge that those courts which have by decision made a distinction between evidence obtained thru the use of a mechanical device and evidence obtained thru the unauthorized listening in or eavesdropping on an extension telephone are making a distinction without a difference. It is the divulgence of the content of the telephonic communiaction which is prohibited.

A telephone conversation may be intercepted as well by an extension telephone in another room as by the method commonly known as wire-tapping. There is no difference except in the name.

Construing the statute and its applicability to the admission of evidence procured contrary to its provisions is: *United States v. Polakoff*, 112 Fed. (2d) 888

> "Every telephone talk, like any other talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by Sec. 605 to hold that because one party originated the call he had power to surrender the other's privilege. There cannot be the least doubt of

this as to the answers of the party called up; and while it might indeed be pedantically argued that each party had the power to consent to the interception of at least so much as he said, that would be extremely unreal, for in the interchange each answer may, and often does, imply by reference some part of that to which it responds. It is impossible satisfactorily so to dissect a conversation, and the privilege is mutual; both must consent to the interception of any part of the talk. In the case at bar Kafton's consent was therefore not enough.

"Moreover, the recording was an 'interception.' It is true that in the three decisions in which the Supreme Court has interpreted Sec. 605, Title 47, U. S. Code, 47 U. S. C. A. Sec. 605, the prosecuting agents had physically interposed some mechanism in the circuit as it had been constructed for normal use; at least this is what we understand by a 'tap.' That was not the case here; the recording machine was merely fixed to an existing extension of the familiar kind in an adjoining room. We assume that the situation would have been no different had the agent merely listened at the extension and taken down what he heard by shorthand. The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts. * * * Violation of the privilege, we are admonished, is so grave a dereliction as to be 'destructive of personal liberty' (Nardone v. United States, 302 U. S. 379, 383; 58 S. Ct. 275, 277; 82 L. Ed. 314) and if it is not to be sham and illusion, it must protect its possesor at least against such intrusions.

"'A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not

disingenuous purpose.' Nardone v. United States, 308 U. S. 338, 341; 60 S. Ct. 266, 268; 84 L. Ed. 307. United States v. Yee Ping Jong, DC, 26 F. Supp. 69, is to the contrary, but does not persuade us."

Reitmeister v. Reitmeister, et al, 162 F. (2d) 691:

"Syllabus 4: Where defendant had a telephone extension in his own separate office leading from main wire, and to receiver at extension defendant attached recording machine and recorded conversations between plaintiff and defendant's employees, defendant in recording the conversations 'intercepted' messages within prohibition of Communications Act.

At *page 694*:

"In the case at bar, Louis recorded the talks which passed along the transmitting wire by means of an instrument, interjected in that wire; and we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire, made *ad hoc*."

A message is intercepted and divulged within the prohibition of the Communications Act whenever anyone causes the message to be transmitted to a third person without the consent of the sender. *U. S. v. Gruber,* 123 F. (2d) 307.

If the speaker thinks he is talking to one person, whereas in fact a third person is listening, there has been an interception of the message within the meaning of the statute. *Billeci v. U. S.,* 184 F. (2d) 394.

In the case at bar Rathbun thought he was talking to Sparks; whereas, in truth and in fact, police officers were listening on an extension telephone.

But, the decisions of the Circuit Courts are by no means uniform in their interpretation of the meaning of the word "interception." The Court of Appeals, Seventh Circuit, in *United States v. Bookie,* 229 Fed. (2d) 130, and *United States v. White,* 228 F. (2d) 832, are at variance with the decisions hereinbefore cited.

The decision of the Court of Appeals, Tenth Circuit, in the instant case brings forth a factual requirement which becomes so fine that it cannot be measured by an instrument known to man. The decision contains the following language:

> "We do not mean to say that violation of the 'Wire Tapping Act' may not result from listening in on extension telephones. Whether such listening in constitutes a violation of the Act would depend on where the extension phone was attached. In the Reitmeister case, *supra,* the majority said: '. . . we cannot see why an existing lead off the main circuit was different from a "tap" into the wire made *ad hoc.*' It may be possible as far as we know to attach an extension phone so that the message passing over it reaches the ear of the listener before it reaches the ear of the one carrying on the conversation and for whom it is intended. If such is possible, in such case it would constitute an interception. * * *"

As this Court has held in *Nardone v United States,* 302 U.S. 379, 383; 58 S. Ct. 275, 277; 82 L Ed. 314, the violation of the privilege is so grave a dereliction as to be destructive of personal liberty, and if it is not to be sham and illusion, it must protect its possessor at least against such intrusions.

The statute does not speak of physical interruptions of the circuit, or of wire taps. It speaks of interceptions. The method that one employs to accomplish an interception is of no importance, it is the breach of privacy which the statute protects. *Nardone v United States, supra.*

VI. CONCLUSION

It is most respectfully urged that Congress in adopting Section 605, Title 47, U.S.C.A. intended to secure to each of us the privacy of telephonic communications by making it unlawful to divulge the contents of any conversation in-

tercepted without consent. The statute was not an attempt to make interception by one means unlawful and to authorize interception by another means.

The instant case is a vehicle by which a final determination may be had clarifying the meaning of Section 605, and of determining that any type of interception, whether by listening in, or eavesdropping or mechanical device, is a violation of that Section and the divulgence of the content of any information so obtained unlawful.

It is respectfully submitted that the judgment of the lower court be reversed, and the defendant released.

Respectfully submitted,

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